

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF DELAWARE

3
4 TQDELTA LLC, : CA NO. 13-1835-RGA,
5 : 13-1836-RGA &
6 Plaintiff, : 13-2013-RGA
7 : September 12, 2014
8 v. :
9 : 8:47 o'clock a.m.
10 2WIRE INC, ZHONE :
11 TECHNOLOGIES INC, & ZYXEL :
12 COMMUNICATIONS INC., et al., :
13 :
14 Defendants.
15
16
17

18 TRANSCRIPT OF SCHEDULING CONFERENCE
19 BEFORE THE HONORABLE RICHARD G. ANDREWS
20 UNITED STATES DISTRICT JUDGE
21

22 APPEARANCES:

23

24 For Plaintiff: FARNAN LLP

25 BY: MICHAEL J. FARNAN, ESQ

1 -and-

2 MCANDREWS HELD & MALLOY

3 BY: PETER J. MCANDREWS, ESQ

4

5 For Defendants: MORGAN, LEWIS & BOCKIUS

6 BY: COLM F. CONNOLLY, ESQ

7 For Defendant 2Wire

8

9 MORRIS JAMES LLP

10 BY: KENNETH L. DORSNEY, ESQ

11 -and-

12 ALSTON & BIRD

13 BY: ELIZABETH J. RADER, ESQ

14 For Defendant ZyXEL

15

16 SEITZ, VANOGRTOP & GREEN

17 BY: JAMES S. GREEN, ESQ

18 -and-

19 LATHAM& WATKINS

20 BY: JAMES L. DAY, ESQ

21 For Defendant Zhone

22

23 Court Reporter: LEONARD A. DIBBS

24 Official Court Reporter

25

1 P R O C E E D I N G S

2

3 (The proceedings occurred at 8:47 o'clock a.m. as
4 follows:)

5 THE COURT: Good morning. Please be seated.

6 MR. DORSNEY: We have a dial-in. I don't know if
7 anybody is going to use it.

8 May I hand it up?

9 THE COURT: I don't know what it means, but go ahead.
10 All right.

11 So this is, I guess, a conference in TQDelta vs. 2Wire
12 Inc., Civil Action No. 13-1835, and TQDelta vs. Zhone, 13-1836,
13 and TQDelta vs. ZyXEL, which is 13-2013.

14 Mr. Farnan.

15 MR. FARNAN: Good morning, your Honor.

16 Michael Farnan on behalf of plaintiffs.

17 With me today is Pete McAndrews of McAndrews, Held &
18 Malloy in Chicago.

19 THE COURT: Good morning, Mr. McAndrews.

20 MR. MCANDREWS: Good morning, your Honor.

21 THE COURT: For the other side, Mr. Green.

22 MR. GREEN: Good morning, your Honor.

23 James Green. With me is James Day from Latham &
24 Watkins on behalf of Zhone.

25 THE COURT: Okay. Zhone.

1 All right. Thank you.

2 Mr. Dorsney.

3 MR. DORSNEY: Good morning, your Honor.

4 On behalf of ZyXEL, Ken Dorsney from Morris James.

5 With me is my co-counsel Elizabeth Rader from Alston &
6 Bird.

7 THE COURT: All right. Good morning.

8 Mr. Connolly.

9 MR. CONNOLLY: Good morning, your Honor.

10 Colm Connolly from Morgan, Lewis & Bockius on behalf
11 2Wire.

12 THE COURT: All right.

13 So Mr. Connolly, are you here just holding the fort, or
14 are you actually really involved in this case?

15 MR. CONNOLLY: Somewhere in between, your Honor.

16 No, actually, I am certainly informed and prepared to
17 address any questions from the Court, but I'm going to let Mr.
18 Day lead the argument, although I might contribute today.

19 Actually, I did play some role in the proceedings
20 leading up to this.

21 THE COURT: Okay. Well, thank you.

22 Actually, to sort of help what I thought the issue was
23 going to be, I have a little hypothetical.

24 Kristin, could you just give -- could someone come
25 forward and get these?

1 You can take a minute to read this exciting
2 hypothetical.

3 Here's the thing.

4 I read the letters that were submitted about, I guess,
5 the Default Standards.

6 As I understand it, there is no particular contention
7 about the first one, which is plaintiff told defendants what
8 products they were accusing, right?

9 MR. DAY: Right.

10 THE COURT: All right.

11 So, then, there is kind of a half-hearted Complaint by
12 the plaintiff about the technical, the deficiency of the
13 technical production by the defendants, which I'm kind of
14 inclined to skip over right now.

15 And then the third one, which is more vigorous on both
16 sides, has to do with whether the infringement contentions this
17 time are sufficient to go forward, right?

18 MR. MCANDREWS: Your Honor, if I just may say something
19 about your first point there, skipping over the core-technical
20 documents.

21 We didn't mean to intend that it's not the dispute that
22 is very important to us. We didn't think that this was the
23 right time to raise it.

24 THE COURT: Well, no, no. I saw you might ask the
25 Court's help later on.

1 So, I wasn't trying to suggest it's not very important,
2 even though what I gathered from what you said in your letter
3 was that, in fact, whatever they produced so far hasn't played
4 any part in your infringement contentions at all.

5 MR. MCANDREWS: That's correct, other than confirming
6 that the products purport to comply with the standards that
7 we've read the claims on.

8 THE COURT: Okay.

9 Well, but the point is, nothing that they provided has
10 been actually cited in any of this.

11 So, essentially -- and you don't have to confirm this
12 is true -- I, essentially, gather you probably mapped all this
13 stuff before ever you brought suit, and then you just handed
14 them what you mapped?

15 MR. MCANDREWS: True, other than confirming that the
16 products had the standards compliance, we believe when we
17 brought suit, you're correct.

18 THE COURT: Well, so, when you say, confirming the
19 standards had met compliance, that's where -- that's the reason
20 why I've written up this little hypothetical, because I thought
21 either you were talking past each other, or at least you were --
22 there was -- I wasn't quite getting what the dispute was,
23 because as I understand it -- you know, and I'm approximating
24 here -- you've done what I asked you to do, which is you
25 narrowed it down to no more than 64 claims spread over your 32

1 patents, or at least, since maybe one defendants, or both of
2 them, two of them don't have 32 patents -- but, anyhow, you
3 narrowed the asserted claims down to less than 64.

4 And, so, you have said in, you know, hundreds and
5 thousands of pages, you know, in the first patent, if you
6 complied with some part of some standard, or maybe the whole
7 standard, you would infringe our patent and here's why.

8 And one, two, three, four, five. And here's a list of
9 products that comply with that standard.

10 MR. MCANDREWS: That's true.

11 THE COURT: I mean that's, essentially, what you've
12 done, right?

13 MR. MCANDREWS: That's correct, your Honor.

14 THE COURT: And, so, then I see them write back or
15 write -- I guess they went first -- write, well, there's a
16 couple of times where they say they complied, that we complied
17 with the optional standard, but there is no indication as to
18 whether we actually practiced the option.

19 And there's some small number of instances cited when
20 this is the case or supposedly the case.

21 And, so, I guess I'm wondering -- and this is not so
22 much a question for you, but for the defendants -- is this just
23 nitpicking around the edges, because for the things where the
24 standards aren't optional, or the part -- where there aren't
25 options, you know, your contentions are sufficient at this

1 point, remembering they are preliminary. And partly that's in
2 your letter, you say, everybody knows that their products read
3 on the standard, you know, high-level documents confirm it, and
4 they know that, and there's no real dispute there.

5 But I didn't quite, necessarily, get that from their
6 letter. I thought maybe they were saying -- well, I don't know
7 what they were saying.

8 So, I guess what I'm trying to figure out is -- and,
9 so, that's part of the reason why I have this little
10 hypothetical, because the case of Fujitsu vs. Netgear, as I
11 understand it, if we had this kind of a standard from some
12 standards setting organization for telling them what that is,
13 and it's got these five things, you know, the first four of
14 which are mandatory, and the fifth of which is just optional,
15 and then you've got multiple patents.

16 Patent one claims the fourth thing, which is mandatory,
17 and Patent 2 claims fifth thing, which is optional.

18 Then -- and what we know about their accused product is
19 if it complies with standard one, you know, we could fool around
20 with exactly what it is supposed to comply with.

21 But let's say it just says, let's say, you know, it's
22 got a seal of some kind that says complies with Standard 1 of
23 the standard setting organization.

24 And, so, it would seem to me, under my understanding of
25 Fujitsu vs. Netgear, taking that fact a step towards the

1 infringement contention stage, that if you say, you know,
2 sufficiently allege, or map, or chart that, essentially,
3 Standard 1.4 -- something meeting Standard 1.4 would infringe
4 your patent, then because that's mandatory. And, if, in fact,
5 it's either agreed, or there's some other easy way to say, yes,
6 it complies -- it complies with the Standard 14, then it seems
7 to me, you know, you've kind of connected A to B and B to C.

8 On the other hand, what they seem to be arguing about,
9 defendants is that you've got your second patent, which you have
10 said -- and, you know, this is what I'm getting from their
11 letter -- that the Standard 1.5 about the antenna when it's
12 operating between 10 and 20 megahertz, that it infringes your
13 second patent.

14 And they're saying -- and it makes a certain amount of
15 sense to me -- that, well, you can't say that our product
16 infringes because it complies with the standard, and one of the
17 optional parts of the standard reads on your patent.

18 And, to some extent, I got from your letter that you
19 were saying, well, then that's something they can bring up
20 later, but it seems to me actually that if there is actually an
21 optional thing that is something that you actually ought to have
22 something more than just saying, well, that is something that
23 you can bring up later.

24 So that's kind of my understanding of what's going on.
25 Maybe now you all can help me.

1 It would probably be easier for me, if my example is
2 useable for you to argue within those terms, rather than
3 whatever standard actually does apply to your hundreds and
4 thousands of products and your hundreds of patents.

5 So Mr. McAndrews, since you're standing up, do you want
6 to tell me what you think the dispute is here?

7 MR. MCANDREWS: So, first of all, your example here is
8 perfect to make the point.

9 So it is correct that we have patents that map on what
10 are called Standard Mandatory Sections of the standard.

11 And, so, that would be your rotary dial consisting of
12 ten finger holes in the patent in one example and it would map
13 that way, so that's what we have been done.

14 There are also portions of standard that are on their
15 face described as -- well, not on their face -- but there's
16 various words used in the standard, itself, to let you know
17 whether it is a standard optional feature.

18 And there are, in fact -- they point out one of the
19 patent family's reads on a standard optional feature.

20 And let's just, for the sake of argument, I'm not
21 saying there is only one. They may say there are others. But
22 we would acknowledge that there is a standard optional section
23 of the standard that we have mapped the claim to.

24 So, what our position is, is twofold.

25 One, the documents they have provided us to date --

1 well, and there is an exception that happened early this week --
2 but the documents they provided us to date do not tell whether
3 that product implements that standard optional feature on
4 information and belief, which we've pled, on information and
5 belief, we believe that we can prove after an opportunity for
6 discovery, that they infringe that patent, right?

7 But the documents they provided to date, do not tell us
8 whether that standard optional feature is being implemented by
9 the DSL components of the device.

10 So, in part what the defendants told us is, they don't
11 know. They don't know whether their product implements that
12 standard optional feature. And we need to go talk to the chip
13 makers.

14 So our position is that we have reached a point where
15 it would be appropriate to open further discovery and allow us
16 to go out and take this third-party discovery.

17 If you recall, your Honor, you limited us to --

18 THE COURT: Yes, I do recall.

19 MR. MCANDREWS: -- exchange. We didn't have that
20 opportunity.

21 The defendants, with a few exceptions, claimed they
22 don't have this information in their possession, and, therefore,
23 we want to have the ability to go out and do that.

24 The second part of this, though, is the defendants
25 claim that they have no ability to move forward in the case.

1 The point is, as you point out in your Example 5 here,
2 I know why you would contend that I infringe that patent.

3 Your Example 5 in your Patent 2 is, "An antenna that
4 operates between 10 and 20 megahertz."

5 They understand that that's my theory of infringement.
6 And if it turns out to be true, based on the information we
7 discovered, then that's my infringement theory going forward.

8 They don't have to guess at what my infringement theory
9 is. They know what it is. They might say -- they might say
10 they don't know whether they infringe.

11 But how can they expect me to have that information,
12 other than information and belief, when they, themselves, claim
13 they don't have it and they denied infringement.

14 THE COURT: All right.

15 That's helpful.

16 Who wants to speak on behalf of defendants here?

17 MR. DAY: Your Honor, James Day for Zhone.

18 I'll at least begin. I'll speak for the defendants.

19 If others want to chime in, I would allow them to do that.

20 THE COURT: All right.

21 Well, I mean they can chime in, because they are not
22 you.

23 MR. DAY: Fair enough.

24 Well, your Honor, there are a couple of things that I
25 want to touch on.

1 One is, first of all, the idea that we picked out the
2 only optional function from these standards. Mr. McAndrews
3 referred to the others as all mandatory. But there is no
4 showing that any of those functions or features of the standards
5 that have been cited are mandatory. They don't use the word
6 "mandatory" in any of the charts to describe anything.

7 And, in fact, rather than that, in the pleading that
8 covered the claim charts when they sent them to us, the TQDelta
9 said, the claims charts are not intended to indicate that every
10 cited section in the identified industry standards or every
11 requirement of every cited section must be practiced by the
12 product in order for a particular claim to be infringed.

13 They also say the claims charts are not intended to
14 indicate that any claim of the subject patent is necessarily a
15 standard section.

16 So what we're told is, you can't assume any these
17 charts are mapping to mandatory functions within these
18 standards. They haven't made any showing. And that's what
19 Fujitsu requires as a threshold, if you are going to try to use
20 the standard as a proxy for the product.

21 So, first of all, it's just --

22 THE COURT: Well, isn't that kind of just a legal
23 conclusion?

24 I mean if Mr. McAndrews wrote a letter saying, okay,
25 you know, what separates one patent family, we actually think

1 all these things are standard, essential, mandatory, or some
2 phrase like that, which, after all, is pretty much a legal
3 conclusion, isn't it?

4 MR. DAY: I don't think so, your Honor.

5 The way that you determine that is by looking at the
6 language in the standard and determining whether it says
7 something like, you must do this, or this is a mandatory --

8 THE COURT: But, I mean -- so, yes, you need some facts
9 to go into this legal conclusion, but it's not -- it's not facts
10 -- it's not something where discovery is going to provide better
11 answers?

12 MR. DAY: Well, sure your Honor.

13 It would be a step in the right direction if the
14 plaintiff's told us which of these charts they think map onto
15 mandatory features.

16 THE COURT: So, let's take -- so Mr. McAndrew's said --
17 and I shouldn't characterize what he said -- but the gist that I
18 got from it was, yes, we have mapped some non-mandatory things,
19 although we think they are there. But most of the things, you
20 know, we don't think are optional.

21 And, in any event, particularly for the things where
22 even the defendants might have trouble figuring out whether, you
23 know, how chips work, we said what our theory is. And, you
24 know, we'll find out soon enough whether, you know, every one of
25 these theories is good or just, you know, something less than a

1 hundred percent of them were good theories.

2 MR. DAY: Here's the problem, your Honor, for
3 progressing this case forward.

4 What we have right now are claim charts that map the
5 claim language to a standard, which is sort an abstract
6 statement, a bunch of functions and features.

7 THE COURT: As opposed to a patent?

8 MR. DAY: Well, okay, so it's two abstract descriptions
9 of something.

10 There is nothing tying that to actual functions,
11 features, instructions in any of the products that they've
12 accused.

13 THE COURT: Well, so that's kind of -- you know, it
14 seems to me if you think of this as being like first grade math,
15 you know, A equals B and B equals C, therefore, A equals C, then
16 the part that seems to be -- what I was hazy about from reading
17 the papers, and it seemed to me to be more of your concentration
18 at least, was this B to C part.

19 MR. DAY: Right.

20 THE COURT: And, so, I guess what I'm wondering is --
21 so Mr. McAndrews in his letter said something about, you know,
22 product descriptions, both sides think it was not very helpful
23 to annotate the infringement contentions with product
24 descriptions.

25 What is it -- actually, just stand there for a second.

1 Mr. McAndrews, on a particular product, you've got all
2 these listed products, what is it that -- how does something get
3 on the list for a particular standard?

4 MR. MCANDREWS: So, your Honor, the product will
5 typically have a data sheet, which is a little bit of a
6 glorified product brochure. It's probably a two-page document.
7 And at the end it will be describe a number of standards,
8 actually by standard number, the ITU uses a standard G dot --

9 THE COURT: Well, in other words, of a piece of paper
10 that says something about a particular standard, like complies
11 with, or I don't know, is there a formulaic kind of way that
12 they do this, or does it vary from product-to-product or what?

13 MR. MCANDREWS: It's certainly standard in the way that
14 the letters are written out.

15 G.992.3 is an ADS2 standard, right? So that would show
16 up.

17 But as far as whether they'll say, complaint with, or
18 uses the standards, or just list standards without any narrative
19 --

20 THE COURT: Well, if something is compliant with the
21 standard, is that the same thing as uses the standard?

22 MR. MCANDREWS: We believe so. We believe so, yes.

23 THE COURT: What do you say?

24 MR. DAY: That is the whole point of most -- of many of
25 these features being optional. That the functionality may be

1 there, but you don't have to use it, or you don't have to
2 provide it at all.

3 So I think it's incorrect to say if you're complaint
4 with a standard, you practice every feature, or even every
5 mandatory feature. It's sort of capability versus what actually
6 is happening.

7 THE COURT: Well, capability -- I don't know. There
8 are 33 patents here. I imagine we have all kinds of different
9 claims.

10 But if it had the capability, of -- I don't know --
11 two-way communication, and the claim is, has the capability and
12 apparatus has capability of two-way communication, haven't they
13 made some progress?

14 MR. DAY: I think this is a half step in the right
15 direction, your Honor.

16 And then the second step is to tie either the claims to
17 the products or these standards they've cited to the products,
18 but they maybe illustrate the problem of what we're having, your
19 Honor.

20 First of all, these charts are designated confidential,
21 so I can't give them to my engineers.

22 THE COURT: We're going to take care of that in a
23 minute.

24 MR. DAY: Right. But saying that, if I could sit down
25 with my engineers -- and I have been able to at least discuss

1 with one of our senior executives -- that based on your
2 hypothetical, there is this optional part of the standard that
3 refers to an antenna, and that antenna is operating at a certain
4 frequency.

5 The problem your Honor is, in this hypothetical, we
6 have products either that have no antenna or have multiple
7 antennas. And we don't know what it is that they might be
8 pointing to, to say, well, there's the one that operates at
9 between 10 and 20 megahertz.

10 So that's the problem. We have not been informed what
11 feature, function, structure it is that they think is practicing
12 each of these functions that are part of the standards they've
13 identified.

14 THE COURT: So your problem is not so much, or maybe
15 not at all, really, the mapping from -- or the charting from the
16 patents to the standards.

17 It's the second part?

18 MR. DAY: Your Honor, I think that some day we're going
19 to dispute some parts of the A to B mapping the claims to the
20 standards, because I disagree with some of those.

21 THE COURT: Well, that's the reason we have trials at
22 the end for those kinds of disagreements.

23 MR. DAY: But I agree with you completely that for
24 purposes of today, and where we are right now, the problem we're
25 facing is mapping something, either the claims, or the standard

1 to the actual products, so that my people can look at the
2 product and say, okay, well, this is the part they're accusing
3 of infringement.

4 And the reason we need to know that, your Honor is, as
5 the plaintiff's have suggested, one way to start narrowing this
6 case down is to come up with representative products. And if
7 you look at their Proposed Scheduling Order, the way they say to
8 do that is to group products that have the same functions,
9 features, or instruction that infringe the claims they've
10 asserted.

11 Well, we don't know what those are, your Honor, because
12 they haven't disclosed those. Until we know what those are, we
13 really can't begin to group things together and pick out
14 representative products that all have that same, supposedly --
15 excuse me -- supposedly infringing feature or structure that the
16 plaintiffs have suggested.

17 So what we're suggesting is a way to start to narrow
18 the case down. If they were to provide real infringement
19 contentions that showed either the claim or the standard, but
20 mapped against our actual products, we would be able to go back
21 and say, okay, well, if this is the piece that they're accusing,
22 we know that all of these DSL products have that same piece.

23 THE COURT: Okay. So a couple of random questions.

24 First off, in terms of invalidity contentions, what
25 does any of this dispute have with your ability to make them?

1 MR. DAY: Well, there's two things, your Honor.

2 One is just the sheer number of patents. We're still
3 looking at 32 patents.

4 THE COURT: You know, I was trying to cut it down --
5 well, go ahead.

6 MR. DAY: The sheer number of patent. Every patent
7 has, potentially, a different priority date. Implicates,
8 potentially, different prior art. There are going to be
9 different written description arguments, depending on if it's a
10 parent or a child patent. There are all sorts of different
11 issues.

12 And, as your Honor knows, if this were a case with
13 three or four patents, there would be a lot of work that would
14 go into invalidity contentions. It's premature to make us to do
15 that now with 32 patents.

16 And the second way that this relates -- this dispute
17 relates is, I'm confident that if the plaintiffs were to go out
18 and try to map the claims of these patents, or even the
19 standards to our products, I'm confident the whole patent
20 families, not just the patents, but patent families would fall
21 out of this case when realize they can't do that mapping.

22 So I believe firmly that we'd end up with fewer patents
23 in this case just by going through that process. And that
24 directly relates to the burden on us in putting together
25 invalidity contentions.

1 I also, frankly, think -- I'm positive that if they
2 went through this exercise, a fair number of the products that
3 they're accusing would fall out, because some of the ones that
4 they accuse don't do anything like what the patents talk about.

5 If there is some data sheet saying this product will
6 comply with a standard, but the thing that it does has nothing
7 to do with what these patents are talking about.

8 So I think this one requirement, putting together
9 normal infringement contentions, would narrow the case down to a
10 point where it would be reasonable with invalidity contentions.

11 THE COURT: So, are you saying, essentially -- and I'm
12 probably overstating the case here -- but these data sheets
13 referencing standards, whatever language they're referencing
14 them, are essentially meaningless?

15 MR. DAY: I don't think that's right, your Honor.

16 I mean they're certainly important for people who were
17 implementing DSL networks. We need to know what's going to be
18 able to operate with what and how things can communicate with
19 each other.

20 I think that given where we are in this case, the fact
21 that something says that it complies with these standards, it
22 advances the ball not at all.

23 THE COURT: Well, so, let's just talk about the
24 practical thing.

25 Mr. McAndrew's says you don't even have the technical

1 -- based on your technical production, you don't have what is
2 necessary for him to be more specific.

3 MR. DAY: Well, I would love to talk about the
4 documents just a little bit, your Honor, because the notion that
5 we have not produced technical documents is false.

6 From Zhones' perspective, we sent our production out on
7 the 26th as required.

8 On that same day we said, and you're getting these
9 documents from at least Broadcom, which is the company that
10 supplies the chips for many of our products, and we are willing
11 to stipulate that you can go out and take that discovery now,
12 despite the general stay on discovery. So the notion that
13 they've been prevented from doing that is false.

14 We produced documents that day.

15 I spent the first half of July sending more and more
16 documents to TQDelta, because they asked for them. I understood
17 they needed them to put together these infringement contentions.
18 They asked for documents. We gave them to them.

19 The last letter I got asking for anything was on July
20 11th. I produced what they asked for and I haven't heard a peep
21 since. So they've got all the documents they asked for.

22 I understood they were going to use those documents.
23 They chose not to. There is not a single citation to a single
24 document in those 1500 pages to any of the defendants'
25 documents.

1 I don't know if they can glean from our documents what
2 their infringement theory is. They haven't tried to do it.

3 I do know that to understand completely how the
4 products work, they are going to need some third-party
5 discovery. We've been prepared to let that move forward, so
6 that they could give us a really infringement contentions for
7 months now, and they've chosen not to do it.

8 THE COURT: All right.

9 First off, do any of the other defendants have
10 something that you want to add?

11 MR. CONNOLLY: I think Mr. Day has done a nice job
12 outlining the argument.

13 THE COURT: All right.

14 Mr. McAndrews?

15 MR. MCANDREWS: Your Honor, I beg to differ with the
16 recitation of the history of document production.

17 First of all, Zhone chose to make documents available
18 on the website. And most of the dispute we had with them was
19 trying to figure out how we would manage production of that.

20 If they were saying, just look at our website. Figure
21 out what you want. And then put the burden on us to Bates
22 number documents and we're trying to keep track of that. That's
23 most of what went on with Zhone.

24 As far as offering third-party discovery to us, of
25 course, the Court prevented that, and wanted us to step through

1 these early stages. We did the best we could with the documents
2 we had.

3 As far as going out and opening up discovery with a
4 company like Broadcom, as an initial matter, we need to know
5 what components of their products are even relevant.

6 I'm not going to go take general discovery of a giant
7 corporation like Broadcom and just say, tell me about your
8 stuff. Tell me about your DSL stuff.

9 I need to know from their documents, that obviously
10 have to exist. Then know -- they don't say, assembly plant in
11 Asia. Give me something that does DSL.

12 That's what I'm hearing from these parties. They
13 didn't have documents like that. They don't have a product
14 specification that says it needs to be capable of this, this,
15 and this.

16 It's going to have this bill of materials with these
17 specific chip model numbers in them, right?

18 As recently as last Friday we were in a discussion with
19 one of the parties on that level. These documents, obviously,
20 exist.

21 For Mr. Day to stand here and say that he is -- he is
22 certain that there are certain of our patent families that don't
23 read on their products, I would like to know how he's certain,
24 because the documents he's given me, don't indicate that. The
25 documents that he has given me, indicate that the products are

1 compliant with the standard, and don't get down to the level
2 that would be necessary to know whether a standard optional
3 feature is practiced.

4 THE COURT: Well, you know, in other cases where
5 defendants have thought the patents were being misread by the
6 plaintiffs who accuse some or all of their products, they
7 usually present some sort of a letter or something explaining
8 why your misguided.

9 I take it you haven't gotten that sort of letter?

10 MR. MCANDREWS: That's correct, your Honor.

11 And, you know, for someone to promise or attest to the
12 fact that they don't infringe isn't, obviously, going to satisfy
13 my client.

14 THE COURT: No, no, no.

15 MR. MCANDREWS: Right.

16 THE COURT: I mean I've seen -- you know, and maybe
17 typically where I've seen this is ones where there is a smaller
18 number of patents issues. Of course, that's starts with every
19 case I've ever had. And, you know, more -- there's kind of
20 finite dispute.

21 Part of the thing of having 32 patents, and I have no
22 idea how many accused products is -- using a lot of time
23 chipping off bits and pieces here and there -- and you've still
24 got a huge thing left.

25 And, so, maybe in a sense this isn't different.

1 Anything else?

2 MR. MCANDREWS: I just wanted to mention one point.

3 You asked the question about -- and actually it was
4 mentioned by Mr. Day -- I referenced that there are some
5 products that are listed. And this is different than when he
6 said there are patent families that are not infringed. He
7 mentioned that there are some products listed that he says,
8 while the brochure may say, standard compliant, it isn't.

9 We agree that that happened. It's an outlier. It's a
10 less than one percent issue here where an adapter that does not
11 have all of the DSL function that are necessary to be an adapter
12 said that it can -- it said, works with products that are
13 complaint we DSL standards. That was a mistake.

14 I have to talk to somebody about why that showed up.

15 We already discussed that issue and I said I would be
16 more than happy, if you want to go through the list with me, and
17 point out where that happens.

18 THE COURT: How many products have you accused,
19 roughly? Round off to the nearest hundred?

20 MR. MCANDREWS: It's different for each party. For
21 2Wire it's the lowest number. They tend to standardize on a
22 model name and sticker for a while.

23 For the other parties, there is a much larger number,
24 but if you dig down into it, it's a really more manageable
25 number.

1 THE COURT: Give me the larger number?

2 MR. MCANDREWS: A larger number is --

3 THE COURT: Ballpark.

4 MR. MCANDREWS: Ballpark. 200.

5 THE COURT: For Zhone.

6 MR. MCANDREWS: For Zhone, for example.

7 THE COURT: And for 2Wire, which is, I guess, at the
8 low end is what?

9 MR. MCANDREWS: Less than 30.

10 THE COURT: Go ahead.

11 MR. MCANDREWS: But the two hundred, if you dig down a
12 little deeper, it's actually a product series. Actually, the
13 defendants, some of them have cited a case to us. There's a
14 Court in California where a party had identified accused
15 products by family, by series, and the Court determined that
16 that was not sufficient.

17 So what we did, we did to the best of our ability, was
18 to list out every suffix to the enth degree of, you know, maybe
19 it has 16 ports, or 32 ports, or it has a different power supply
20 than the other one.

21 Not really relevant to the infringement issue, but we
22 wanted to make sure that we had as many model numbers as we
23 could possibly list. If we could back it up to a series,
24 though, we would have a more manageable number.

25 THE COURT: All right.

1 So I think Mr. Day said that some of these standards,
2 it's hard to tell whether they're mandatory or not mandatory.

3 What do you think about that?

4 MR. MCANDREWS: Well, I think he may have been mixing
5 two issues.

6 So one was whether the patent is a standard essential
7 patent. And I think that what they're trying to do is force
8 some sort of admission out of us that a patent standard is
9 essential.

10 In the Innovatio case, Judge Holderman determined that
11 that was a -- that the burden of proof fell on the defendants
12 for establishing something that is standard essential.

13 Now, simply the fact that a claim reads on an optional,
14 and actually the analysis doesn't matter whether it is optional,
15 standard optional, or whether it's an option spelled out in the
16 standard. So, as far as standard essentiality goes, it doesn't
17 matter whether it's a standard optional or a standard mandatory
18 portion of the standard.

19 What does matter, though, is a different issue than I
20 think is presented by these initial claim charts though is,
21 whether there is an alternative that was available that the
22 parties can, essentially, comply with the standard without
23 infringing the claim.

24 Which is a slightly nuanced different issue. It does
25 matter in certain circumstances that -- I don't think this is

1 the -- I mean I could try to describe them to you, but --

2 THE COURT: But I mean, you know, I can imagine you say
3 something has to be 10 megahertz, or 20 megahertz, and may be,
4 even though I would have thought your mapping to the standards
5 would take care of that issue.

6 I mean, after all we're saying, or I'm saying mapping
7 to the standard, you know, we're talking about -- we're talking
8 about preliminary contentions here. You know, a hundred percent
9 accuracy is nice, but there is a reason why they're preliminary.

10 And we don't have -- whether you use it or not -- you
11 don't have a lot of technical information. So, the fact that
12 there can be sort of points of dispute, you know, I think that's
13 very much in your favor at this point, because we are trying to
14 get the ball rolling.

15 And, so, I'm not too concerned about that.

16 But I guess one of the things that Mr. Day said was
17 that it wasn't so clear a lot of times, when there is a
18 standard -- I mean I guess if you can map a patent to what the
19 standard says, depending on how that is going, maybe you're
20 saying in it, well, here we think the standard says or
21 requires...

22 Okay. Let me skip that thought, because I'm not making
23 any progress there.

24 So, on the second side, these data sheets things,
25 something's complaint with, or complies with, what does that

1 mean?

2 MR. MCANDREWS: What does it mean?

3 THE COURT: Right.

4 MR. MCANDREWS: Well, it would mean at a minimum that
5 the product practices the mandatory portions of the standards.
6 It also means that it is more likely than not that the practice
7 is an optional portion, particularly on information and belief
8 that it's known that that an option that most parties use.

9 THE COURT: All right.

10 One side or the other said they were going to bring
11 some infringement contention to show me, because, apparently --
12 because the letters -- I actually appreciate letters that don't
13 have thousands of pages attached to them -- but because the
14 letters, I don't know, weren't sufficiently crystalizing
15 actually what the dispute was here.

16 So, I take it, I think it was Mr. Farnan's letter that
17 said you would bring something?

18 MR. MCANDREWS: Yes, your Honor.

19 I just brought a sample here. Of course, I didn't want
20 to bring 1500 pages. These happen to be charts that our -- that
21 were meant 2Wire.

22 THE COURT: Okay.

23 MR. DAY: Your Honor, we brought the charts that are
24 cited in our letter. May we also hand those up?

25 THE COURT: Well, why don't you -- I'm trying to avoid

1 getting too many sets of charts here.

2 Why don't we start -- Mr. McAndrews, what you have, is
3 that cited in the letter somewhere or is that something that
4 there has been no reference to?

5 MR. MCANDREWS: It was only a reference. We did not --
6 we do not know exactly what would be provided to the Court.

7 I can read into the records what this is, though.

8 THE COURT: Well, let me just start, because this maybe
9 a poor direction to follow, but Mr. Day, why do want you give me
10 what you did actually cite in your letter.

11 MR. DAY: Your Honor, we cited multiple charts for two
12 different points. This is one example of each of two points.
13 It's two charts.

14 THE COURT: All right.

15 And which --

16 MR. DAY: For Zhone, it was No. 53 and No. 30.

17 THE COURT: All right.

18 MR. DAY: There is some difference in numbering between
19 the parties.

20 THE COURT: All right.

21 So Claim Chart 30.

22 (Pause)

23 MR. MCANDREWS: Your Honor, if I could point out that
24 those charts are missing the cover page. And I don't think that
25 was their intent to indicate that there is no reference to

1 products in our charts. But there is a cover document that goes
2 with those charts that explains which products the charts apply
3 to.

4 THE COURT: Right. I remember seeing your letter
5 saying something like that.

6 So, there is a page that says this applies to -- I
7 mean, there is some other page which says what products are
8 covered by this claim, right?

9 MR. DAY: Correct, your Honor. There is a chart that
10 has a list on the left with a bunch of products on the right.
11 It says --

12 THE COURT: Claim Chart 30.

13 MR. DAY: -- Chart 30 shows how we infringe.

14 THE COURT: Okay.

15 (Pause)

16 THE COURT: Okay. By the way, in your two letters, I
17 saw the -- obviously, the Fujitsu/Netgear case.

18 Did either of you actually cited a case that -- so both
19 of you were reasoning from that as to what is required in an
20 infringement contentions -- did either one of you cite something
21 that was actually dealing with infringement contentions and the
22 standard?

23 MR. MCANDREWS: No, your Honor, we did not. We
24 couldn't find anything at that level.

25 MR. DAY: No, your Honor.

1 THE COURT: Okay. Just hoping here.

2 MR. DAY: Your Honor, may I offer some more thoughts on
3 the charts?

4 THE COURT: Yes, but let me just look at it first.

5 (Pause)

6 All right.

7 Mr. Day, what are your thoughts about Chart 30?

8 MR. DAY: Well, your Honor, Chart 30 is just an
9 example. We cited it because the footnote on the first page
10 makes it's clear that this is an optional function.

11 It says in the footnote that the standard does not
12 require a standard compliant device, et cetera, et cetera.

13 But the problem, your Honor, if you look at the chart,
14 the standards are stated -- and, again, as I said earlier in
15 abstract terms, they are not concrete functions that are easily,
16 or certainly is not easily mapped to an actual product.

17 The problem is, it's the implementations of the
18 standard that is really accused here, your Honor, but we don't
19 know what that is that they are accusing.

20 And I think one of the things that provides -- and Mr.
21 McAndrews talked about -- illustrates this problem. It gets
22 back to your question about what the data sheets mean.

23 The patent talks about things that happened at what's
24 called the Central Office. So that's at AT&T over here, and
25 then things that happen in the modem in your house. That's the

1 consumer premises equipment, and that's way over here.

2 Well, they also accuse some things. They listed some
3 things that sort of sit in the middle. They'll do anything that
4 is stated in the patents. But it's complaint with the standard,
5 because this thing that goes in the middle, it's called a
6 splitter, one example works in a system that allows
7 communications, DSL communications consistent with the standard.

8 So, the standard has hundreds, maybe thousands of
9 different functions and features, but just because something is
10 complaint with that standard can be used in a network that
11 complies with that standard, doesn't mean it necessarily
12 practices any one those particular features.

13 It could be, like this product, something that just
14 sits in the middle, and it splits your telephone line off in one
15 direction and splits your DSL line off in another direction.

16 If we had infringement contentions that tried to map to
17 that product -- first of all, it sounds like that product --
18 those splitters are going to go away, as I suggested earlier.

19 But I think if they went through this exercise, other
20 products would also fall out. But I think the bigger advantage
21 of getting clarity on what it is they're accusing is that then
22 we would have some ability to group these products based on the
23 accused functions, features, structures, once we know what those
24 things are.

25 And, your Honor, there is another point I wanted to try

1 to make using your hypothetical, if you would indulge me just a
2 moment?

3 THE COURT: Sure.

4 MR. DAY: Here's the problem.

5 Mr. McAndrews is suggesting that the part of the
6 standard that talks about dial is the rotary dial is mandatory.

7 Let's assume that's true.

8 The problem is, the standards are often stated in sort
9 of functional terms, or this is the way it needs to work, but
10 the doesn't tell you how to implement it. It doesn't say what
11 you need to do to make that thing happen.

12 So, imagine for a minute that No. 4 in the standard
13 said, you need to have a method for dialing. It's similar to
14 what you have here. That's the way the standards actually
15 describe things. You have to have some way to dial. And the
16 patent said, you need a phone with a rotary dial with ten finger
17 holes.

18 Just because you comply with the standard, even if that
19 was a mandatory part of the standard that you have something
20 that dials, that doesn't mean that you have a rotary dial with
21 ten finger holes.

22 The problem that we have here, your Honor is, if you
23 just map on to the standard, we don't know what it is that they
24 think to the rotary dial on our phones. I mean this is a very
25 simplified example.

1 When you look at the chart in front of you, and the
2 discussion on the right-hand side, it's incredibly technical
3 stuff, stated in terms like I just used, and it's not at all
4 clear what it is that they think what functions, features,
5 structures in our products are meeting those parts of the
6 standards that they've cited.

7 And, ultimately, it's their burden. This is their
8 lawsuit. They want to have a patent infringement lawsuit. And,
9 at a minimum, they ought to be telling us what it is about our
10 products that they think infringe before we have to go out and
11 do invalidity contentions based on really no understanding of
12 what they think the scope of these patents are with regard to
13 our products.

14 THE COURT: So, just carrying the telephone example, or
15 maybe restating sort of what you just said, if the standard said
16 you need a method for dialing a number, and the patent claims a
17 rotary dial, and then you say the standard reads on the rotary
18 dial, that's a method for dialing a number.

19 So what you're saying is, you could have a push button
20 phone system that would also read on the standard and yet it
21 would not read on the patent?

22 MR. DAY: That's right. We certainly would say it
23 would not.

24 But perhaps the plaintiff would disagree, and we'll
25 never know that there is that dispute until they tell us what it

1 is about our products that they think is --

2 THE COURT: And, so, going on to the Netgear and
3 Fujitsu, when they're talking about when you're going to do this
4 kind of analysis, you have to cover all the possibilities that's
5 -- that would be what you're telling me, that's how I connect
6 those two things up?

7 MR. DAY: That's the point.

8 Fujitsu says, look, if you want to use a standard as a
9 proxy for a product, you've got to show that that part of the
10 standard is mandatory, and that every way you can meet that
11 standard infringes the patent.

12 If you do that, okay, fine, we'll let you use this
13 short cut. If you can't, then you haven't connected the logical
14 up. You haven't shown what my product does with it.

15 And that's what we have here, your Honor.

16 THE COURT: Okay. I understand that point at least for
17 a minute.

18 Let me hear from Mr. McAndrews before I forget.

19 What do you think about that?

20 MR. MCANDREWS: Well, I think what he's talking about,
21 if he's talking about at the infringement proof stage of the
22 case --

23 THE COURT: Well, let's talk about what the stages are.

24 In terms of what is Netgear was talking about, is that
25 a fair characterization? Is that a fair example, I guess?

1 MR. MCANDREWS: I don't think so.

2 So, in Fujitsu what they were talking about is that
3 there are standard mandatories. What Mr. Day is suggesting is
4 that we've got claims that we've read on the standard mandatory
5 section. He's suggesting that somehow we're wrong.

6 I suppose he's saying that, right?

7 He is entitled to say I'm wrong about that. It's not
8 because he doesn't know what my contention is.

9 THE COURT: I guess what he's saying is somebody --
10 let's say there are three ways to practice the standard.

11 And you claim in your patent, or the patent claims, one
12 of those three ways.

13 Hold on a minute.

14 (Pause)

15 You said you didn't agree.

16 Go ahead, speak some more.

17 MR. MCANDREWS: Going back to Fujitsu just briefly, so
18 that the point of Fujitsu is it's at the infringement proof
19 stage. In fact, it's determining whether a party can satisfy
20 its burden by coming forward at the time of Summary Judgment.

21 And what the Court suggests is that when you read a
22 claim on a standard where the product purports to be standard
23 complaint, that that can satisfy your burden at the stage of
24 Summary Judgment. And it would then flip the burden of
25 production back on the defendant to come forward.

1 And the quote continues. So after the quote it says,
2 "Reading on the standard is the same as comparing the claims to
3 the accused product."

4 It goes on to explain in the same paragraph that "An
5 accused infringer is free to either prove that the claims do not
6 cover all the implementations of the standard or prove that it
7 does not practice the standard."

8 They're free to do that. They're free to provide that
9 information to us.

10 If we have interrogatories available, if we can take
11 the third-party discovery that they think we need, if we can
12 continue with discovery on their documents and their engineers,
13 we can learn these things.

14 Now, moving to the related issue, it's not as gray as
15 Mr. Day would suggest. It's not the standard that says, well,
16 you might do it, and you figure out a way to come up with it.

17 These standard have to be very precise. And the reason
18 for that is you have a party like Zhone who keeps its
19 information highly confidential and doesn't share it 2Wire.

20 And yet when you have a Zhone CO product at AT&T, and
21 you have a customer with two-wire modem in their home, it has to
22 work. It isn't up for grabs. You guys figure out a way to do
23 it and then we'll troubleshoot after the fact.

24 These products have to be installed and work, all
25 right?

1 I have broadband problem at my house I'm not happy
2 about. I figure when that thing shows up and they plug it in,
3 that thing is going to work.

4 And that's what standards compliance is about. It's
5 very precise. It's not gray as Mr. Day suggests. It's very
6 precise.

7 So, let me use an example from the chart that they've
8 provided. This is on Page 2 of 9 of Claim Chart 30 that he
9 provided.

10 And I'll acknowledge that this is in one of our charts
11 where we've acknowledged in the footnote up front that this is
12 something that might or might not be implemented by their
13 product.

14 Let me clarify what I mean by that.

15 So this claim has multiple elements. And the multiple
16 elements of the claim let's say the first three elements address
17 how the central office equipment is going to communicate with
18 the CPE.

19 And it says, you must exchange these messages, okay?

20 And that based on that exchange -- that is absolutely
21 mandatory, not optional -- based on that exchange, the CPE
22 device, for example, might use the information it learned and it
23 might share its memory or it might not.

24 That's implementation specific that -- by defendant,
25 right?

1 But the first part of this is absolutely mandatory.

2 The reason we have this footnote, though, is it's not
3 the full story. You've got this additional element of the
4 claim. I'm going to use the information that had to be
5 exchanged, and I'm going to do this with -- I might ignore those
6 messages and not do it, but I have to exchange this information.

7 So, one of the things that has to be exchanged, and it
8 is spelled out in a great level of detail in the standard, and
9 our claim maps directly to what's going on there is,
10 "transmitting by a transceiver a message during initialization"
11 -- and this O-PMS message happens during initialization --
12 "specifying a maximum number of bytes of memory that are
13 available to be allocated to a de-interleaver.

14 "The O-PMS message conveys" -- and I'm on the
15 right-hand side now -- "The O-PMS message conveys the initial
16 PMS-TC parameter settings that shall be used in the upstream
17 direction during Showtime. It also specifies the portion of the
18 shared interleaver memory that the VTU-R can use to
19 de-interleave the downstream data stream."

20 This is a message that goes out. This isn't something
21 that happens inside the device, and nobody else in the universe
22 cares about this. This is a message that is being transmitted
23 to a foreign piece of equipment. And the only hope that they
24 have for communicating with each other, in practicing the
25 standard, is that they both recognize that message. That it's a

1 according to the standard. So it's nowhere near as gray as Mr.
2 Day would suggest.

3 And to the extent that there is any level of grayness
4 here, that's why we need to move forward with discovery. They
5 want to put the breaks on now and I have yet to hear from him
6 exactly what it is that he needs.

7 What additional detail does he not have?

8 He keeps saying methods to my product, and he's saying,
9 show me what part of my product does it.

10 If he's saying he wants me to say what happens in your
11 DSL chip sets, it happens in hardware, or it's a software thing
12 that is loaded. If he wants me to say that, your Honor, I don't
13 have sufficient information to do that yet, because they haven't
14 provided it yet.

15 THE COURT: All right.

16 I think I have a sense of what I'd like to do here.

17 I'm going -- what I'd like to do is, I'd like to
18 actually get the infringement part of this case moving, and
19 partly in the hope that it will actually narrow down what is
20 actually at issue. It might. It might not. I don't know.

21 The main argument I hear from Mr. Day is that this is a
22 ridiculous amount of effort to go and to try and say why 32
23 patents are invalid. And there is a certain amount of
24 believability in that statement.

25 So what I'm inclined to do is to sort of stage this,

1 which is, I'm going to put off the invalidity contentions being
2 due until some time in the future, once we further streamline
3 what's going on in the infringement side.

4 And, in terms of the infringement side, you know, I
5 think that the plaintiff has done enough, in terms of
6 infringement contentions, to go forward with discovery and, you
7 know, working on getting whatever other technical specifications
8 the defendants are going to actually produce themselves, that
9 the plaintiff has said it has sort of put forth what it says its
10 infringement theories are, and you go out and get the technical
11 specifications.

12 And these promises -- not promises -- but these
13 representations -- not even that -- but the suggestion that the
14 defendants think that parts of this case will fall away, you can
15 work on that and find out whether it is true or not. I mean, in
16 the end -- well, I don't want to say anything about what in the
17 end.

18 So, in any event, that's what I'm thinking of doing.
19 I'm not actually sure how to do -- so, if that's what I said to
20 do, what would be the next thing that you all would be doing
21 about infringement?

22 MR. DAY: I'm sorry, your Honor. I missed your
23 question.

24 THE COURT: Okay. I said, if that's what I did, what
25 would be the next thing that you all would be doing about

1 infringement?

2 MR. MCANDREWS: Well, your Honor, we would serve
3 discovery requests and interrogatories.

4 One of the things we would do is, we would ask them to
5 categorize the chips that you are in their product, to the
6 extent that they think we need to go out and get third-party
7 discovery. And we need to have them to identify chips for us
8 first, and, so, we know who to go ask and about what.

9 We would ask them to possibly submit interrogatories to
10 have them pinpoint documents to us that show where certain
11 features are implemented. We'd be looking for additional
12 documents. We'd take some depositions of their engineers to
13 determine how these products are put together, and what their
14 engineers know about documentation, and where we might find
15 relevant documentation.

16 So, we'd move forward that fashion.

17 As far as -- and I understand, your Honor, I don't want
18 to argue with you over whether we put off invalidity contentions
19 -- but I believe that we're going to reach a stage where things
20 can't be narrowed any further, because we --

21 THE COURT: Well, no, no. I'm sure we are.

22 I don't doubt what you're saying.

23 MR. MCANDREWS: Right. So we are going to reach a
24 stage where we do claim construction. And we can't do the claim
25 construction until we know what terms are important.

1 THE COURT: For sure.

2 MR. MCANDREWS: And let me just mention on the issue of
3 burden, I haven't had a chance to respond to that.

4 I understand what Mr. Day is saying, that there's a
5 burden whether there are 32 patents that they need to address.

6 But the truth of the matter is, when you look at an
7 individual patent family -- and I think there is potentially
8 nine for the parties that have 32 patents asserted against them
9 -- I think there are nine families. For 2Wire there is only
10 seven families.

11 The truth of the matter is that since we've limited it
12 to fewer than an average of two per patent, and there is
13 significant amount of overlap between the claims across these
14 patent families, we're not really not talking about the burden
15 of 32 patents. You know, the initial step was to limit
16 ourselves to less than two per.

17 THE COURT: Right, I remember.

18 MR. MCANDREWS: And then there is a substantial amount
19 of overlap when you have a family.

20 So, when they try to go out and find the prior art,
21 it's not like you need -- if you have a family of five patents,
22 you don't need to have five separate, you know, searches done,
23 right?

24 You're searching that family of patents.

25 THE COURT: I hear what you're saying.

1 Mr. Day?

2 MR. DAY: Your Honor, what we would suggest -- and on
3 the invalidity contentions, I'm not going to address it, because
4 I agree with you, your Honor.

5 THE COURT: You agree with me. That's pretty funny.

6 MR. DAY: Assume that I have no objections to your
7 suggestion.

8 On the infringement side, what I would suggest is,
9 we've already -- Zhone has already produced bills of materials
10 for all these products, and told them which chip makers they
11 need to go talk to. If they want to send an interrogatory
12 asking for what I've already given them, I think it's a waste --

13 THE COURT: Well, let's not argue. That's too much
14 detail, because Mr. McAndrews, what he said originally about --
15 before he starts going off on to third-party discovery, he needs
16 to know what he's looking for.

17 MR. DAY: Well, that's a problem then, your Honor,
18 because that reverses what really needs to happen.

19 Most of the DSL functionality is going to be found in
20 these chips that none of our clients make. They buy those from
21 third parties.

22 What needs to happen is, the plaintiff need to go to
23 take to those chip makers and figure out --

24 THE COURT: Well, actually, I don't know whether this
25 is what you've already produced on are not, but I think when Mr.

1 McAndrews' said that you don't just buy chips like I buy AA
2 batteries, that you, you know, have some specifications. And
3 what you may or may not have produced already, I mean certainly,
4 you know, if he wants to find out whether your contract with
5 Broadcom requires you to do, or requires them to do, or, you
6 know, something to that effect. What you're engineers tell
7 their engineers. You know, that seems to me the logical -- a
8 logical way to do it.

9 MR. DAY: Your Honor, so I think we've already given
10 them that from Zhone.

11 THE COURT: Okay.

12 MR. DAY: So I --

13 THE COURT: Exactly where we are in this process right
14 now, we're not going to figure that out today.

15 MR. DAY: But let me jump to the point that I want to
16 make, which is, it's not time for generally discovery in this
17 case.

18 THE COURT: What do you mean by "general discovery"?

19 MR. DAY: Damages discovery, taking a bunch of
20 depositions, e-mails from all of our engineers.

21 I think if we're going to focus on infringement, what
22 we need to do next is, if they don't think they've gotten our
23 technical documents, tell us what they don't think they have,
24 and we can work on that. That's something that we can give they
25 them. Technical documents describing these functions.

1 What really needs to happen next is, they need to go to
2 these chip makers and figure out what it is that they think
3 infringes, because that's the only way we're going to be able to
4 join the issue here.

5 They're going to say to us, well, here's how the chip
6 -- here's the part of the chip that does what we think
7 infringes.

8 How do you invoke that function, okay?

9 Now I know understand what they're talking about. Now
10 I can go to my people and say, this is what it is they're
11 talking about.

12 So what I would propose to focus on infringement. And
13 what we should do is complete the production of any, you know,
14 further core-technical documents and do the third-party
15 discovery that's necessary. Then let's get to infringement.

16 THE COURT: Well, so, a couple things about that.

17 One is, of course, I don't know what Mr. McAndrews has
18 in mind in doing that. But part of this narrowing might
19 actually involve figuring out which of your products are most
20 worthwhile to the case.

21 I wouldn't think it was, you know, at a general level,
22 if he wants to find out something about the sales of these
23 products now, that's fine by me.

24 What was the other thing you didn't want him doing?
25 Checking the e-mails.

1 MR. DAY: E-mail discovery. It's the really burdensome
2 parts.

3 THE COURT: Well, e-mail discovery does seem like, you
4 know, unless your engineers are writing all their specs and
5 e-mails, then we're never getting anywhere else.

6 I mean, I don't know if I recognize if I see it, but I
7 think you all would recognize when there's been a reasonable
8 production on your part to materials that tell him what he needs
9 to do.

10 So, for example, you know, let's say you buy Broadcom
11 Chip No. 1 in large quantities for putting into all the products
12 he's accused.

13 Well, then I don't know. Maybe he already knows that.
14 I don't know.

15 But if he doesn't know that, then going down and trying
16 to chase from Broadcom what the details about Chip No. 1 is, you
17 know, is sensible. He's not sure whether you're using Chip No.
18 1, or Chip No. 2, or Chip No. 3 in Broadcom, and Broadcom at
19 this point is, you know, is not a good use of his client's
20 resources.

21 MR. DAY: Yes. So that's what I'm suggesting, your
22 Honor is, we tell them what -- what is goes our products. As I
23 said, we've given them the bills of materials. We can do that.

24 Here are the chips we used for Broadcom and other
25 companies. Then they can go and talk -- take discovery from

1 those folks and figure out what this case is about.

2 And that's the point when I think they can expand their
3 discovery to -- to us to try to -- because then they can tell us
4 what the functions are that they're accusing.

5 I mean that's the problem.

6 What I'm suggesting is, we stage this to do the
7 third-party discovery, get to a point where we know what it is
8 that they're talking about.

9 THE COURT: Actually, kind of what I have in mind --
10 well -- I'm sorry --

11 MR. DAY: Obviously, we need to give them enough
12 information to allow that first stage. I'm not suggesting that
13 they go out blindly and talk to every chip maker.

14 What I'm suggesting is that we take an incremental step
15 forward, which is, we provide whatever information they need to
16 go out and figure out what chips they need to take discovery on,
17 and then they do it. And once they have done that, then they
18 come back and tell us what this case is about, you know, how it
19 is that they think our products infringe. Then it would make
20 sense to go on to, you know, we provide them with interrogatory
21 responses, and engineers for depositions, and that sort of
22 thing.

23 But if we move directly to that, while we're still in
24 the dark about what their theories are, it's an unfair position
25 for us to be in.

1 THE COURT: All right.

2 Mr. McAndrews?

3 MR. MCANDREWS: Let me go backwards and start with what
4 he said last.

5 He said that he is in the dark about what our theories
6 are, right?

7 He keeps saying this. He keeps suggesting that they
8 don't know.

9 And he says, it could be this, it could be that.

10 We've had this discussion on the phone. He hasn't come
11 up with one single example where he says, it could be, and then
12 he actually uses a word other than this, right?

13 Other than a pronoun. He uses an actual word or a noun
14 to refer to something in his product, right?

15 THE COURT: Okay.

16 MR. MCANDREWS: They know what our infringement
17 contentions are. Let's not misstate that. They know exactly
18 why or not that their products infringe.

19 It could be pled otherwise, if they didn't know that,
20 right?

21 As far as the staging of discovery that he's suggested,
22 so what we've seen in the last week, your Honor, are documents
23 showing up for some of the parties. It is not uniformly true.

24 And Mr. Day may not be aware of some of this, but we
25 are literally getting documents that have a matrix that says

1 "standards compliance matrix." And it's not at the G.992 level
2 or whatever it is. It's at the -- this is the specific clause
3 of the standard, is our product that we are requiring our chip
4 maker, we are requiring him to make sure that his product works
5 this way, right?

6 We are getting things like that. We are getting
7 documents that indicate to us that the information will not be
8 in the hands of the chip maker.

9 Well, these documents are confirming that the
10 information is in the hands of the defendants, but then they're
11 suggesting that there may be some information in the hands of
12 the clip maker.

13 The other types of documents we're getting, or types of
14 indications on these documents are, it will list a standard
15 section and then it will say HW.

16 And what that means is that the hardware they're going
17 to receive from chip maker is capable of doing that, but their
18 software load that they do -- not the chip maker, what they
19 do -- will implement that feature or not.

20 So to suggest that we're going to do this in stages and
21 getting anywhere, if you limit me to going out and trying to get
22 third-party discovery through subpoenas of third parties, we're
23 not going to move along.

24 THE COURT: Okay. I'm sympathetic to what you're
25 saying here, Mr. McAndrews.

1 And, so, basically what I have in mind is, you know,
2 I'm trying to create the right incentives here, but,
3 essentially, you conduct infringement discovery however you
4 think best. You know what you need. I think you know what you
5 need. And I think you would be the best one to figure out how
6 to get there.

7 So I'm not going to say do stages like this and stages
8 like that. You use your good judgment on what you want to do
9 first, second, third, et cetera.

10 But I do think that at some point -- and I don't have a
11 particular date in mind here that you are going to have to, I
12 think, do something more than you've done already with the
13 infringement contentions. I mean I thought you said this in
14 your letter. You're actually going to have to --- I mean I
15 think the infringement contentions in the end -- I'm not
16 actually a hundred percent sure as I sit here that Netgear was
17 shifting the burden of proof on infringement here, which is what
18 you seem to suggest, and it strikes me that's hard to believe
19 that that's actually what they said.

20 MR. MCANDREWS: I would suggest the burden of
21 production at the Summary Judgment stage.

22 THE COURT: All right. All right.

23 Fair enough. You did say that. You know, I was
24 thinking at the end of the road here it's your burden.

25 MR. MCANDREWS: Of course it is.

1 THE COURT: But yet at the Summary Judgment stage, I
2 think -- actually, that sounds exactly what they said.

3 So I guess maybe -- do we need to have some kind of --
4 you know, the positions in the Proposed Scheduling Order that
5 had limits on things like admissions, and interrogatories, and
6 depositions, and, of course, I don't have anything from the
7 defendants on this -- is there any reason why we can't just
8 impose those as the limits that we have in this case, and sort
9 of get moving on that then?

10 MR. DAY: Well, your Honor, you do have our position on
11 those from the Scheduling Order we submitted in the spring,
12 which is the only -- that's one we put in our position on all
13 those types of things, and we think it's appropriate to do that
14 again.

15 THE COURT: Can you send me a letter now saying that
16 you were relying on that?

17 MR. DAY: Yes. I think our letter said that it was
18 appropriate that this wasn't the appropriate time. If I'm
19 misremembering that, I apologize, but we talked about this, and
20 I believe it made it in one of our letters that we didn't think
21 it was appropriate to --

22 THE COURT: Well, no, no. I saw that you objected to
23 their proposed Scheduling Order here. Now I'm just asking, did
24 you tell me -- did you go back to March, or whenever we met
25 before, that's what we'd like?

1 MR. CONNOLLY: I don't think we did, your Honor, but
2 we're not going to change our position on what we've already
3 submitted to the Court.

4 THE COURT: No, no. It's just a question of me trying
5 to get prepared here. You know, I don't go fishing through the
6 record looking for -- well, in any event, okay.

7 Okay. Well, it's not very helpful, because if I've got
8 one document that I've read, and another document that I haven't
9 read, and I obviously don't remember.

10 MR. DAY: Also, this document has things that you're
11 not adopting today, your Honor.

12 THE COURT: Well, no, no, no. That's right. That's
13 the reason why we're saying -- we're, essentially, picking bits
14 and pieces that would be necessary for going forward on
15 discovery.

16 MR. CONNOLLY: Your Honor, may I suggest that in terms
17 of the numbers of admissions, interrogatories, those types of
18 things, I think we're all agreed to.

19 THE COURT: Okay.

20 MR. CONNOLLY: And I understand the Court. And,
21 certainly, we expect that there will be some kind of order that
22 will say, plaintiff's can proceed with infringement discovery.
23 If plaintiffs wants to allocate all of its admissions to
24 infringement discovery, that would be plaintiff's choice. I
25 don't think we need to limit the --

1 THE COURT: No, no, no. That's what I was going to do
2 with the numbers that you agreed on. If, in fact, what
3 you're telling me is that most of this was agreed on before, as
4 to what the total numbers are, we'll set the overall numbers
5 now, but we're only going to do the infringement part. But when
6 the invalidity part comes, that will go against these numbers.

7 MR. CONNOLLY: Exactly.

8 MR. MCANDREWS: Your Honor, it's actually not true.
9 The parties did not agree on the number of interrogatories, the
10 number of deposition hours.

11 It was an issue of not being balanced, right?

12 They wanted more, because there is one of us, and we
13 wanted to keep the burden similar between the groups of parties.
14 So there is a substantial disagreement there.

15 THE COURT: Why don't we do this, Mr. Connolly.

16 MR. CONNOLLY: I apologize.

17 MR. DORSNEY: We have your guidance that you want to
18 impose limits on interrogatories and admissions.

19 Can we meet-and-confer and --

20 THE COURT: Well, Mr. Dorsney, you're a brilliant man,
21 because that's what I was going to suggest. That you see if you
22 can't come up with some order.

23 And the main thing is that I think we would need to
24 have another status conference in January or so to see how
25 things are going, to see whether we're getting to the point

1 where we either really cannot narrow anything down, and we need
2 to go with invalidity contentions, or whether we are narrowing
3 things down, and then we can go with invalidity contentions, and
4 get the rest of the case moving along, too.

5 I hate to put you on the spot here.

6 Is what I've said been intelligible enough so that you
7 think you can do this or have I left too much up in the air with
8 half-finished sentences and the like?

9 MR. MCANDREWS: I understand your guidance, your Honor.

10 THE COURT: Are you okay, Mr. Day?

11 MR. DAY: Yes. And I assume the next step is, we will
12 meet-and-confer over a proposed order.

13 THE COURT: And submit it.

14 MR. DAY: And submit that.

15 THE COURT: And if there is disagreements over the
16 number -- some number where it's sort of a binary choice, just
17 put the disagreement in and I will pick one.

18 MR. DAY: Yes.

19 MR. MCANDREWS: Your Honor, I don't want to take up too
20 much more of your time --

21 THE COURT: No, no, no. That's all right.

22 MR. MCANDREWS: -- just I wanted to mention two things.

23 One, the deposition limit may be an issue for us,
24 because if we're limited to discovery on infringement issues,
25 technical issues related to their products, some of these

1 parties will likely have witnesses that wear multiple hats.
2 They maybe the guy that is out there marketing the products, as
3 well as the guy that knows their products best from a feature
4 perspective.

5 So, if we take his deposition related to infringement
6 issues, later on we may need from, you know, the marketing
7 what's the important features perspective, and we maybe need the
8 guy from their accounting perspective.

9 So that's one issue.

10 And then the other issue, your Honor, as you mentioned,
11 it will be useful to have sales by unit, revenue, location,
12 location of manufacturer, for example, and location of sale.

13 And I'm not intending to limit myself in these
14 categories, but as you pointed out, we may need to understand
15 what the important products to pursue. It doesn't make sense
16 for us --

17 THE COURT: I'm perfectly with you on that.

18 MR. MCANDREWS: Yes. We don't need Product 275, if
19 they sold half of one and it was returned, so I have no interest
20 in leaving that on my list down the road.

21 So if we can figure out what the high-volume sellers
22 are, that's going to help us as well.

23 THE COURT: So I'm with you on that.

24 Are you looking for something more?

25 MR. MCANDREWS: No. I wanted to make that the

1 defendants go away with the understanding that this is the
2 infringe technical guys only and --

3 THE COURT: No. I think I made myself pretty clear.
4 Mr. Day?

5 MR. DAY: Your Honor, on that point, I'll say for the
6 record I disagree. I don't think we should put damages ahead of
7 infringement.

8 THE COURT: No, no.

9 MR. DAY: But your position, clear.

10 THE COURT: Okay. Thank you.

11 MR. DAY: These charts are designated "Confidential"
12 and --

13 THE COURT: Well, before we get to the charts -- and
14 we'll get to that in a second -- but in terms of having an
15 understanding to have a meet-and-confer to try to submit an
16 order, we're all good here?

17 MR. DAY: We understand the instruction, your Honor.

18 MR. CONNOLLY: Your Honor, can I have clarification?

19 So, the discovery that's going to go forward is going
20 to be infringement discovery plus some limited damages discovery
21 about amounts of sales with the already identified accused
22 products?

23 THE COURT: Well, what I would say is, relatively
24 speaking, I would call it summary damages discovery. Something
25 that Mr. McAndrews can figure out what appears to be the most

1 productive targets for him to look at.

2 MR. CONNOLLY: Okay. And --

3 THE COURT: I'm sorry. Go ahead.

4 MR. CONNOLLY: It's going to be limited, though. I
5 mean I heard Mr. Day -- and it's not my client's preference that
6 we proceed this way -- but the Court has ruled.

7 But I think, as I understand it, it is going to go
8 limited to the products already identified, correct? And it is
9 going to be summary kind of sales, there was mention of location
10 --

11 THE COURT: Right. I think it is reasonable to give
12 him an idea of what royalty basis for his claim, so sales in the
13 U.S. during the last six years, or the six years that are
14 relevant, assuming these products have been around for that
15 long. I don't know.

16 Sort of by-product, because I'm sure that if you give
17 the product a number, your client also gives it a dollar figure,
18 right? That's the kind of thing you're looking for?

19 MR. MCANDREWS: That's right, your Honor.

20 THE COURT: And I'm not meaning to limit Mr. McAndrews
21 to what I've just said, but I don't expect -- I'm expecting --
22 you know, I use the words "summary damages discovery." That's
23 kind of the level that I'm trying to say, and I realize maybe
24 summary may be two other products, or 30 products.

25 But something, so he can tell which products are your

1 money makers.

2 MR. CONNOLLY: All right, your Honor.

3 So, then, those are the two topics. We're not going to
4 see discovery beyond those two topics. That's the only thing I
5 want to leave with here.

6 THE COURT: I don't know what other topics you have in
7 mind. But in terms of invalidity, no, you're not going to see
8 invalidity discovery.

9 What else do you have in mind?

10 MR. CONNOLLY: Well, that's chiefly what I had in mind.
11 I just want to make sure that those are the two topics.

12 THE COURT: Okay. Invalidity. I'm hoping that if
13 things went well, maybe we can get that started in January?

14 But, you know, if things go well. You know, somehow I
15 have the sense that I might even be seeing you before January.

16 But, in any event, I will see you in January, okay?

17 Have I clarified what you needed, Mr. Connolly?

18 MR. CONNOLLY: You have. And the only thing, if we
19 need to, is to come back with is the confidentiality.

20 THE COURT: Yes, yes. We'll come back for it.

21 Is there anything else?

22 Mr. Dorsney?

23 MR. DORSNEY: One point for the record, your Honor.

24 We're not submitting an entire case schedule. We're just
25 submitting portions of it.

1 THE COURT: I think it makes sense to just submit what
2 you need to--

3 MR. DORSNEY: The interrogatories and --

4 THE COURT: You know, to the extent there are things
5 that have limits, it's going to be for entire case, but you're
6 not going to submit things with a trial date, or a pretrial
7 conference, and expert discovery. That will be figured out
8 later.

9 So, basically, you need to do the things where you need
10 an overall number now, and the things at least will get us
11 through January.

12 MR. DORSNEY: Exactly, your Honor.

13 THE COURT: Okay. All right.

14 So, these charts, Mr. Day?

15 MR. DAY: Your Honor -- sorry -- the chart contains
16 publicly-available patents.

17 THE COURT: I understand it is all public information.

18 MR. DAY: Right. It is all public information.

19 The only it thing that TQDelta claims to have added is
20 its work product. Work product is not protected after you've
21 disclosed it.

22 So there is nothing in these charts that is
23 confidential, so there's no basis to claim, certainly not
24 outside counsel -- outside trial counsel only eyes.

25 And the prejudice to the defendants is, I think

1 obvious, but I can't show these charts to my engineers.

2 They're saying -- Mr. McAndrews is saying, oh, they
3 know exactly how they infringed.

4 That I know is false, because I can't sit down with my
5 engineers and show them the charts and say, you know, what's the
6 deal here?

7 They have to be fair. They have agreed to let us
8 disclose to one of our executives, who I had to identify to
9 them, which is not a feasible way for us to move forward with
10 this, your Honor. If these really were confidential, that might
11 be an approach, but they're not.

12 So, there is no basis to hamstring our case. We can't
13 talk to our engineers. We can't talk to our technical -- third-
14 party technical consultants, and we can't go out and talk to
15 third parties, like the chip maker, so we're prejudiced in this.

16 The prejudice that the plaintiff's identified that
17 somebody might take these to the PTO and try to instigate a
18 reexamination, and IPR, or something like that, that's the
19 natural result.

20 THE COURT: Is there any reason, in that regard, why
21 you three wouldn't be the most likely people to be doing that?

22 MR. DAY: I think that I would be speculating, but I
23 think there might be some chip makers out in the world who might
24 be interested in these. I just don't know.

25 THE COURT: Okay.

1 MR. DAY: But it's the natural result of making
2 allegations in this case that those may be used in some way with
3 regard to these patents.

4 But I think an even more fundamental point is, your
5 Honor, these folks are saying they have patents that cover every
6 product that complies with these standards. And it's unfair for
7 them to try to keep those positions secret. The whole point of
8 patents, or at least one of the points, is to provide public
9 notice of what the patent covers.

10 THE COURT: Well, of course, the patents are public.

11 MR. DAY: Right.

12 THE COURT: So they've filed suit. So they're given a
13 certain amount of public notice.

14 MR. DAY: That's true. But the patents don't say, we
15 think we cover every product that complies with the standard.

16 That's the position that the patent owner has taken and
17 it is fair that that not be kept under wraps.

18 THE COURT: Okay.

19 MR. CONNOLLY: I want to add a point to Mr. Day.

20 There is a thing called the First Amendment. This is a
21 Court. And the plaintiff made a choice. He decided to bring
22 the dispute in open court.

23 And in the Third Circuit, you're not allowed to have
24 closed proceedings. And, so, that needs to be said and
25 considered by the Court at this time.

1 THE COURT: Okay. Even in that regard, it's not as
2 though he's had filings with the Court asking me to put them
3 under seal.

4 MR. CONNOLLY: But there is nothing private in them.

5 THE COURT: Okay.

6 All right.

7 Mr. McAndrews?

8 MR. MCANDREWS: Well, your Honor, first of all, I
9 disagree with that basic premise that there is nothing private
10 in them.

11 I mean the whole point here is, the information has not
12 yet been made available to the public. Therefore, by
13 definition, it is private and confidential.

14 The concern, your Honor, in addition to the Patent
15 Office proceedings where they could waived -- by the way, we've
16 literally had one of the defendants say, I can publish these on
17 the internet if I wanted to.

18 What purpose would be served if --

19 THE COURT: Mr. Connolly, it sounds like a First
20 Amendment position.

21 MR. MCANDREWS: I was on the phone with Mr. Connolly,
22 actually. And maybe it was tongue and cheek, but the point is,
23 your Honor, we have the ability to taint a jury pool. We have
24 the ability to create DJ jurisdiction for parties that we're not
25 interested in engaging with right now. If this Court wants MDL

1 treatment with 40 defendants, then that might be a result of
2 making these documents public.

3 What I haven't heard, though -- so, what I can tell you
4 is that these documents have been maintained in confidentiality.

5 No party out there that we've engaged with has been
6 able to take these documents and freely share them. We wouldn't
7 be having this discussion if that had happened, so they have
8 been kept confidential. They are private documents.

9 THE COURT: Well, they're not too private when you gave
10 them to the defendants.

11 MR. MCANDREWS: I agree with that. The defendants have
12 them. And the defendants can use them as they need to.

13 I think it is unfair to suggest that they have somehow
14 been hamstrung. I can show you the e-mails where we've offered.

15 If you can tell us that you need five engineers, we
16 will let you have five engineers. In fact, I think we've done
17 that with ZyXEL.

18 We have said, you can show it to the engineers that
19 need to know, as long as those engineers agree to maintain the
20 confidentiality of these documents.

21 So they were designated "Attorney's Eyes Only," only
22 because all we had in place was the Default Protective Order in
23 the district, which requires Attorney's Eyes Only. That's all
24 we had available to us at the time.

25 So, when the parties contacted us, they explained their

1 need to share it with their in-house people. We were very open
2 to that.

3 In fact, we went as far as saying, if you genuinely
4 have a third party that you need to show this document to for
5 some reason, we would agree to that, as long as that third party
6 will agree in that confidentiality.

7 So, there is no prejudice here whatsoever, your Honor.
8 This can share these documents pretty much with whoever they
9 want subject to the Protective Order, subject to a party signing
10 on and agreeing to the bound by the Protective Order.

11 And the Protective Order is no good -- the
12 confidentiality is no good if there isn't some mechanism in
13 place for maintaining that confidentiality. And there's a
14 downside, you know, contempt of Court, if they violate it.

15 But as to our ability to control these documents, it's
16 going to be an incredible burden on my client.

17 THE COURT: And why is it a burden on your client?

18 MR. MCANDREWS: It's a burden because third parties
19 will take this information and potentially file Declaratory
20 Judgment actions.

21 THE COURT: Okay.

22 MR. MCANDREWS: If we approach a party and say, we're
23 trying to comply with our FRAND application, as we've attempted
24 to do with these other parties, we have DSL patents that we
25 believe your products may practice, and you may need a license

1 on. We would like to engage in negotiations with you outside
2 the scope of litigation.

3 Will you enter into an NDA with us, and will you sign a
4 Standstill Agreement, so that we can try to negotiate without
5 running to the Court?

6 We no longer will have that ability if these charts are
7 made public. They will be used to maintain that there is an
8 actual -- actual case or controversy. They'll be running into
9 Court with those documents.

10 So the defendants haven't explained any legitimate
11 downside that can't be addressed by a Protective Order that
12 allows them to share the information with somebody that has an
13 actual need to know.

14 THE COURT: All right.

15 MR. DORSNEY: Your Honor, if I could add one thing on
16 this point?

17 If we were down the road in this case, and they had to
18 prove a case of infringement in open court, they would have to
19 put these charts -- make them available. They would have no
20 basis to seal the courtroom.

21 I don't see why that is any different today than eight
22 months from now or two years from now.

23 THE COURT: You're in the First Amendment camp with Mr.
24 Connolly.

25 MR. DORSNEY: I basically am.

1 And, at this point what we're trying to do is just
2 maintain its competitive advantage in the industry so they don't
3 go around suing a whole bunch of people and try to sue a whole
4 bunch of people without them ever knowing about it.

5 THE COURT: All right.

6 Mr. McAndrews?

7 MR. MCANDREWS: I'm just going to speculate, your
8 Honor, that eight months from now, and hopefully we will be that
9 far in eight months, but it's going to be the defendants that
10 are going to be asking you to clear the courtroom, because by
11 then we're going to have our experts weigh in. We're going to
12 have their discovery. They're going to have all sorts of
13 technical documentation that they've got 15 stamps on that
14 nobody else can see, all right?

15 So the hypothetical is actually --

16 THE COURT: Did Mr. Farnan tell you how I would react
17 to that.

18 MR. MCANDREWS: I imagine not very well.

19 THE COURT: That should be a hint.

20 MR. MCANDREWS: Judges don't like to put padlocks on
21 their courtroom doors, and I certainly understand why, but the
22 defendants, at least now they are stamping their documents
23 confidential.

24 In fact, in many cases, they are stamping documents
25 confidential that I could go on the internet on my phone right

1 now and find.

2 THE COURT: Well, okay.

3 So they're bad children, too.

4 MR. MCANDREWS: I didn't intend to swing mud that way,
5 your Honor.

6 But the point is, at this stage of the case, they don't
7 need to make these documents public.

8 THE COURT: Mr. Day, I don't need to hear anything
9 more.

10 You know, this issue has come up multiple times.

11 When lawyers find out something that is work product,
12 and protected by the work product privilege, when the work
13 product disclosed to the opposing party, it ceases to be
14 protected by the work product privilege.

15 Here, the plaintiff is arguing for confidentiality of
16 its lawyer's work product, which cannot be protected as work
17 product, because it's been disclosed to the defendants.

18 Infringement contentions and their supporting claim
19 charts are not in and of themselves confidential information,
20 once they have been provided to the opponent.

21 See Medtronic Sofamor Danek USA, Inc. V. Nuvasive,
22 Inc., 2009 Westlaw 8590869, *2, Southern District of California,
23 August 13th, 2009.

24 Also, Constellation LLC v. Avis Budget Group, Inc.,
25 2007 Westlaw, 7658921, *1, Eastern District of Texas, October

1 30th, 2007.

2 I have read Exit Exchange Corporation v. Casale Media,
3 Inc., 2012, U.S. District Lexis, 40000, Eastern District of
4 Texas, March 23rd, 2012.

5 But I don't believe that's very compelling, because I
6 cannot tell what the underlying factual situation was that the
7 Court was dealing with.

8 I would note that the harms that are identified by the
9 plaintiff that it might be sued by chip makers, or other people
10 with whom it would like to license the patents if defendants
11 shared information, or information gets out, don't really strike
12 me as harm.

13 However, there are things that happened in the
14 marketplace, but simply everything that a party would rather not
15 have happen doesn't make it a harm.

16 I do, on the other hand, see restricting the
17 dissemination of these charts within defendants organizations to
18 engineers possibly with knowledge, or whatever, is actually a
19 harm as it would tie the hands of the defendants, or just make
20 it more difficult for the defendants to respond to the
21 plaintiff's allegations.

22 And, to some extent, there is a harm to the extent that
23 the defendants actually have to name the people in the
24 organization who are getting this information, as it would then
25 allow the plaintiff to actually track their thought processes,

1 would almost be a sort of reverse work product endeavor.

2 I guess like Mr. Connolly and Mr. Dorsney, but perhaps
3 stated slightly different, it is in the public interest to
4 understand how the patentholder perceives the scope and the
5 interpretation of its patents.

6 See the Constellation at *3.

7 Thus, I conclude that defendants are free to treat the
8 infringement contentions and claim charts however they want.

9 All right.

10 Is there anything else today?

11 MR. MCANDREWS: No, your Honor.

12 MR. DAY: No.

13 THE COURT: All right.

14 So, do you think it is reasonable to expect that you
15 will meet-and-confer and submit this order by, say, the end of
16 next week?

17 MR. MCANDREWS: Yes, your Honor.

18 MR. DAY: Yes.

19 MR. MCANDREWS: Your Honor, I'm sorry. One additional
20 point.

21 The parties are working out a Protective Order.

22 How would you like us to approach it? Should we submit
23 them at the same time?

24 THE COURT: You can submit it whenever you get it
25 worked out, or, if you want -- you know, I get more extensions

1 of time over the submissions of Protective Orders than probably
2 any other single thing.

3 So, if you want to, if you can submit it at the same
4 time, that's fine. But I wouldn't hold up the Scheduling Order,
5 just because you don't have the Protective Order. Say in the
6 Scheduling Order what date you intend to get the Protective
7 Order done by.

8 And if you don't get it by that date, and you're having
9 a problem, you know, do one of two things.

10 Either submit it, you know, with little things that I
11 can cross out, you know, if they are the kinds of things that
12 can just be resolved like that.

13 If there are things that you want to talk to me about
14 how to resolve them, then follow the discovery dispute
15 procedures, okay?

16 MR. DAY: Yes, your Honor.

17 MR. MCANDREWS: Yes, your Honor.

18 THE COURT: Okay. Thank you.

19 MR. MCANDREWS: Thank you, your Honor.

20 MR. DAY: Thank you, your Honor.

21 (The proceedings adjourned at 10:33 o'clock a.m.)

22 * * * * *

23

24

25